



Att. Gen. Op. No. 11 II B04

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ATTORNEY GENERAL

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March 29, 2011

**BY EMAIL ONLY**

Ms. Maureen Milford  
Reporter  
The News Journal  
mmilford@delawareonline.com

**Re: Freedom of Information Act ("FOIA") Appeal of Agency Denial of Records**

Dear Ms. Milford:

On February 22, 2011, you emailed the State Solicitor to request a determination by the Chief Deputy Attorney General as to whether the Delaware Department of Transportation's ("DelDOT") violated FOIA in its response to your January 12, 2011 request for records. However, you did not send this office a copy of your January 12 FOIA request until March 1, 2011. Moreover, when you requested our determination, DelDOT was continuing to provide you with responsive records. A petition pursuant to 29 *Del. C.* § 10005(e) is not ripe for our review when the public body has neither ignored a FOIA request nor failed to provide public records within a reasonable time. However, as DelDOT has now represented to this office that its response to your request is complete, this is my determination of your petition.

**FACTS**

On January 12, 2011 you sent to the Secretary of DelDOT a written request for "[a]ll documentation including e-mail correspondence, letters, agreements or other written material

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related to [DelDOT's] interactions related to the former Wright Chrysler property on Del. 1 in Lewes." According to DelDOT, on February 4, 2011, you reviewed, at DelDOT's legal department office, five files from the DelDOT real estate section, marked which documents you wanted copied, and left the office with your copies. You also received a written summary of the documents, which referenced records that were not produced on February 4. On the same day, you told DelDOT that you did not find any "documents, such as normal e-mail correspondence, that dealt with discussions in the planning department or with DTC when the deal was first proposed." You also asked for documents regarding negotiations between DelDOT and Wright, and on "the justification for allowing the easement for the billboards. . . . Please consider this a request under FOIA: I would like any e-mails, letters or other documents from the Department of Planning or other departments in DelDOT regarding the initial proposal by Bob Wright until the actual sale in 2010."

In response to that second request DelDOT began a search for what they call the "history" documents. Specifically, DelDOT requested such records from the finance department, the planning department, Facilities Management (for DTC records) and Public Relations. The records responding to that search were given to you on February 14, 2011. At about that point DelDOT requested from the Delaware Department of Technology and Information (DTI) all emails from four DelDOT employees regarding the Wright Chrysler transaction.

On February 17, 2011, additional records were located in the real estate section and were hand-delivered to you. On February 24, 2011 DelDOT received from DTI the CDs of all emails

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for the four employees from February, 2010 to February, 2011.<sup>1</sup> By March 8, 2011, the DelDOT review of the emails was complete, and the relevant emails were provided to you. According to DelDOT, that completed their response to your FOIA request concerning the Wright Chrysler transaction.

### **RELEVANT STATUTES**

FOIA provides that every citizen<sup>2</sup> shall have "reasonable access" to public records for "inspection and copying." 29 *Del. C.* § 10003(a).

### **DISCUSSION**

Your January 12, 2011 FOIA request was broad enough to cover the documentation of the "history" of the Wright Chrysler transaction; DelDOT was mistaken when it interpreted your request narrowly to include only the records of the sale/purchase of the property. It might have been better practice for DelDOT to have contacted you with its understanding before concluding that it had only to provide you with the real estate files. However, there is no evidence that DelDOT intentionally mischaracterized your request, and therefore there was no FOIA violation. In any event, you have the rest of the records now, so no remediation would be required.

DelDOT did not comply with FOIA when it provided you with a summary of public records, rather than the records, themselves. Again, you have all the records now, so no remediation is required.

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<sup>1</sup> DTI routinely purges all emails older than one year.

<sup>2</sup> While FOIA refers throughout to "citizens," it is unconstitutional to restrict the rights created by FOIA to only citizens of Delaware. *Lee v. Minner*, 458 F.3d 194 (2006).

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DelDOT has not explained why it found additional records in the DelDOT real estate section on February 17, 2011. That additional materials, such as the environmental report, were not produced initially, suggests that DelDOT did not do an adequate search when it received your request. Again, however, you now have all the records, so no remediation is required.

Finally, DelDOT did not request the emails from DTI until sometime in February. DelDOT violated FOIA by not being reasonably prompt in contacting DTI when it received a FOIA request for emails, especially in view of DTI's ongoing, routine purging of emails. Moreover, FOIA requires that the public body notify the requestor when requested records are in storage. There is no evidence that DelDOT told you that emails were being recovered from DTI, and what the process and time frame would be for reviewing those emails.

#### CONCLUSION

Although DelDOT did not fully comply with FOIA in its handling of your FOIA requests, because you have received your records, no remediation is necessary.

Sincerely,

A handwritten signature in black ink, appearing to read 'Charles E. Butler', with a stylized flourish at the end.

Charles E. Butler  
Chief Deputy Attorney General

cc: Frederick H. Schrank, Deputy Attorney General